



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nzibo v Battisti (Civil Appeal E077 of 2024)  
[2026] KEHC 560 (KLR) (Family) (23 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 560 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**CIVIL APPEAL E077 OF 2024**

**PM NYAUNDI, J**

**JANUARY 23, 2026**

**BETWEEN**

**ZENA CHEPCHUMBA NZIBO ..... APPELLANT**

**AND**

**FABIO BATTISTI ..... RESPONDENT**

*(Being an appeal from part of the Order emanating from the Ruling of the Honourable Kibosia, Dated and Delivered at Nairobi on 9th July 2024 in Milimani Children's Case No. 2016 of 2019)*

**JUDGMENT**

1. The appellant being dissatisfied with part of the ruling of Honourable Kibosia, dated and delivered at Nairobi on 9<sup>th</sup> July 2024 in Milimani Children's Case No. 2016 of 2019, presents memorandum of appeal dated 11<sup>th</sup> July 2024 and seeks the following orders-
  - a. This appeal be allowed
  - b. The Court do declare that the Children Court lacks jurisdiction on the welfare and issues concerning the minors in question who are resident and habituated in USA
  - c. The order on mandatory co- parenting training, therapy and transitional counselling by the Court be set aside as it was not sought or pleaded by any party.
  - d. The Court to set aside the judgment (sic) on grounds that the trial Court has arrived as its findings based on actual errors.
  - e. The costs of this Appeal be awarded to the Appellant



2. The Application was canvassed via written submissions; the appellants submissions are dated 4<sup>th</sup> August 2025 and those of the respondent are dated 27<sup>th</sup> September 2025.

### **Summary Of The Appellant's Submissions**

3. On the 1<sup>st</sup> and 2<sup>nd</sup> grounds it is submitted that the Learned Magistrate erred in granting orders that had not been pleaded or sought by either party. Reference is made to the decisions in *Karin Anne Challis v The Hon Attorney General & 6 Others* [2002] eKLR; *Lamba v National Security Fund & Anor* (Civil Appeal E168 of 2021) [2023] KECA 124 (KLR) (3<sup>rd</sup> February 2023) (Judgment) and *Antony Francis Wareham t/a AF Wareham & 2 Others v Kenya Post Office Savings Banl* [2004] eKLR.
4. On the 3<sup>rd</sup> ground the appellant challenges the jurisdiction of the Court to issue orders in respect of minors who are outside the jurisdiction of the Court and relies on the decision in *Twictor Investments Ltd vs The Government of the United States of America* [2003] eKLR. The appellant submits that the Court failed to acknowledge her changed immigration status as she is now outside the jurisdiction of the Court and orders issued would therefore be in vain.

### **Summary Of The Respondent's Submissions.**

5. On whether or not the Court erred in issuing orders that were not pleaded, it is submitted that Article 53 of *the Constitution* vests in the Court broad powers. It is submitted that the best interests of the child principle would in this case transcend the jurisdictional limits of the Court and reliance is placed on the decision in *SMM v ANK* [2022] eKLR. Finally, it is submitted that it is the appellant who is guilty of approbation and reprobation.

### **ANALYSIS.**

6. At the outset I remind myself of the duty of this Court as a first appellate court as enunciated in the celebrated decision of *Selle & Another v Associated Motor Boat Co. Ltd and Mbogo & Another v Shah* [1968] EA 123, where the Court stated-

... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanor of a witness is inconsistent with the evidence generally.

7. The impugned ruling relates to the appellant's application dated 26<sup>th</sup> January 2024. After numerous court appearances, the Court delivered its ruling on 26<sup>th</sup> January 2025 in which it ordered that-
  - a. That the Objection based on res judicata fails
  - b. That the Children shall remain domiciled in the United States with the Plaintiff/ mother for now
  - c. That the defendant/ father is granted unlimited but reasonable access in the United States
  - d. That the defendant/ father is granted unlimited but reasonable audio-visual contact (at US time)
  - e. That the parties to enrol in coparenting coaching (virtually,) within 30 days from today's date. This is to enable a proper co-parenting plan. Parties to agree on choice of therapist and in the event they fail to agree to contact the Court for appointment.



- f. That the Children to undergo transitional counselling as earlier ordered by the Court within 30 days from today's date.
  - g. THAT the defendant/ father to file a current affidavit of means and file proof of 50,000/- monthly deposits (from the day judgment was rendered to date)
  - h. That summons to issue to the in-charge DCI Child protection unit to update the Court on the status of the expunging order, content on the minors herein is still circulating on social media despite expunge and gag orders
  - i. That mention on 6<sup>th</sup> August 2024 (for DCI follow up)
  - j. That this being a family matter, I make no order as to costs.
8. The appeal herein is limited to the orders of the Court requiring that the children undergo transitional counselling and the appellant and respondent attend coparenting coaching.

### **Determination**

9. Having considered the pleadings, submissions filed and the relevant law, I consider the following the issues to be determined by the Court-
- a. Whether the Court erred in finding that it was vested with jurisdiction
  - b. If the answer to (a) above is in the negative, whether the Court erred in granting orders that were not pleaded or sought by either party.
10. At the outset I wish to underscore that the Court in adjudicating matters relating to children is bound by the paramountcy principle as pronounced under Article 53 of *the Constitution* of Kenya and Section 8 of the *Children Act* that enjoins the Court to consider the best interests of the Child above all other competing interests. This was reiterated by the Supreme Court in the decision of MAK v RMAA & Others Petition No. 2 (E003) OF 2022 when it pronounced thus-
- (66) The children's rights legal regime (*the Constitution*, *Children Act* (repealed), CRC, and the African Charter on the Rights and Welfare of the Child) emphasizes the centrality of the best interest of the child. The best interest of the child is determined by the circumstances of the case as they specifically relate to the child. This comprises the principles that prime the child's right to survival, protection, participation, and development above other considerations and includes the rights contemplated under Article 53 (1) of *the Constitution*. As such, the focus must be on the child and what is best for him/her.
  - (67) In addition, there is no hierarchy in the children's rights provided for under *the Constitution*. In other words, all the rights provided under Article 53 are in the child's best interest. The 'best interests' concept is further strengthened by being the 'paramount' consideration. This means that the best interests of the child are to be the determining factor when making a decision on the child. It is against this aspect that parental rights ought to be balanced. This is also taking into consideration that no right should be compromised by a negative interpretation of a child's best interest.
11. In case of MA VS ROO [2013] ECLR, Hon Justice Kimaru stated as follows:

What is the best interest of the child has not been defined by the law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time. What is not in dispute, however, is that there are



certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child's welfare should be taken care of under the best possible circumstances. (own emphasis)

12. In this case the best interests of the Children would entail providing protection to insulate the children from the tumultuous breakdown of the relationship between the parents and the acrimonious proceedings herein. It is on the basis of this that the Court made the impugned orders. This constitutional imperative does not however vacate foundational safeguards of our judicial system that require that the Court in exercising its mandate does so within the confines of the Bill of rights and in this instance Articles 48 and 50 of *the Constitution* which guarantee to all persons the right to access to justice and right to a fair hearing.
13. On the 1<sup>st</sup> issue therefore, whether the Court erred in finding that it had jurisdiction? Jurisdiction it is well established is everything, without it a Court is compelled to down its pen. The Supreme Court in the decision of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others (Application 2 of 2011) [2012] KESC 8(KLR) (23 October 2012) (Ruling) states-  

(68) A court's jurisdiction flows from either *the Constitution* or Legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law...without jurisdiction, the Court cannot entertain any proceedings.
14. The appellant is challenging the jurisdiction of the Court as in the course of the proceedings she left the Country and is currently resident in the United States of America together with the Children. She submits that the Children are therefore outside the jurisdiction of the Court. Children Courts are established under Section 90 and 91 of the *Children Act*. They are charged with enforcing the Children's Act. The Objects of the Act are set out under Section 3 as-  
The Objectives of this Act are to-
  - a. give effect to the provisions of Articles 27, 47, 48, 49, 50, 51 and 53 of *the Constitution* on matters relating to children; and
  - b. give effect to the State's Obligations concerning the wellbeing of children in accordance with the general rules of international law, treaties and conventions ratified by Kenya.
15. In the case of Republic v Senior Resident Magistrate Mombasa ex-parte HL & another [2016] eKLR Emukule J. stated as follows-  
The fundamental question here is the rights of the child. Under *the Constitution* and the relevant legislation, namely the *Children Act* of Kenya, (Cap 141, Laws of Kenya), which embodies and gives effect to the International Convention on the Rights of the Child, and the African Charter on the Rights of the Child, the Courts of Kenya have the jurisdiction to give effect to the rights of the child, irrespective of the origin of such child. It does not matter that child came from the howling sands and winds of the Sahara Desert, the depths of the Congo forests, the Miombo woodlands of Tanzania, the windswept Drakensberg mountains of the South of the continent, the steppes of outer Mongolia or the fringes of the world's oceans and seas, the courts of Kenya will give shelter and succor to that child. Under our Constitution, the rights of the child are paramount. It would be unworthy of our Constitution if jurisdiction were denied to our courts.
16. This was reiterated by Kendagor J. in ALAO v SOO [2024] KEHC 13098 (KLR). It is impossible to state this more clearly. The Children Court as constituted by the Act, is vested with the Constitutional



mandate of safeguarding the rights of a child. The cause herein was initiated when the Children were resident in Kenya. The application dated 26<sup>th</sup> January 2024 sought to enforce orders of the Court granted on 26<sup>th</sup> July 2022. At stake is the Child's right to parental care. It is contended in that application that the appellant has refused to comply with the orders of the Court. It would make a mockery of justice if a Court were to be barred from ensuring compliance with its orders.

17. The Children may have been removed from the jurisdiction of the Court but the Court still has the mandate to compel observance of its orders. When it comes to safeguarding a Child's rights the Court indeed will have a long arm that enables it to cross borders and reach and prod parties to act in accordance with the Child's best interests. The Court cannot be muzzled; it is duty bound to pronounce itself on measures it considers necessary for the protection of the children. For this reason, I find that in the circumstances of this case the trial court was vested with jurisdiction.
18. The 2<sup>nd</sup> issue is whether the Court erred in granting the impugned orders viz; the requirement that the children be subjected to transitional counselling and that the parties attend co-parenting counselling.
19. The appellant contends that the Court overstepped its limits as neither party sought these orders. Indeed the law is clear that parties are bound by their pleadings and that a Court cannot issue adverse orders against a party without giving them an opportunity to be heard. These principles are well entrenched and are at the core of the Constitutional right to a fair hearing and access to justice.
20. The record shows that the Order for transitional counselling was issued on 26<sup>th</sup> July 2022. There was no appeal from these orders. In fact the record of the proceedings before the trial court on 14<sup>th</sup> March 2023 show counsel for the appellant urging the Court not to make orders on overnight access before the transitional counselling is done. On this ground I decline to interfere with the Court's directive requiring that the children undergo transitional counselling.
21. With regard to the order for coparenting Counselling, it is evident that the Court was actuated by the desire to nudge the parents towards acting in the best interests of the child. As observed above the paramountcy principle does not negate a parties right to fair trial. In this instance, neither of the parties sought this as a relief and the Court did not invite them to make submissions on the same. The Court had the noble objective of 'safeguarding the holistic wellbeing of the child as envisioned by Article 53 of *the Constitution*'.
22. This did not absolve the Court from the due process requirements of our Constitution. Parents in any event have the primary duty with regards to the welfare and wellbeing of their children. I will therefore vacate the order requiring that the parties attend coparenting counselling.
23. In the end therefore the final orders are
  - a. The appeal only succeeds to the extent that orders requiring the parties to attend coparenting coaching are vacated.
  - b. The appellant will however facilitate transitional counselling for the children within 30 days.
  - c. The file is hereby returned to the Children's Court to ensure compliance with the order.
  - d. This being a family matter there shall be no order as to costs.

It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF JANUARY 2026.**

**P. M. NYAUNDI**



## **JUDGE**

In the Presence of

Fardosa Court Assistant.

Korir for Respondent.

Magogo holding brief for Malenga for Applicant.

